NO. 48324-6 (Consolidated No.)

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DAMIEN RAPHAEL DAVIS
and
MARCUS ANTHONY REED, APPELLANTS

Appeal from the Superior Court of Pierce County
The Honorable Michael E. Schwartz

Nos. 13-1-01442-6 & 13-1-01440-0

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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B. STATEMENT OF THE CASE.

1. Procedure

On April 5, 2013, Ariel Abrejera, Daniel Davis[1], defendant Damien Davis and defendant Marcus Reed were all charged with murder in the first degree and robbery in the first degree while being armed with a

[1] While Daniel Davis shares the same last name as defendant Damien Davis, they are not related. RP 731. There are also multiple individuals associated with this case who share the last name of Davis, including defendant Damien Davis, witness Daniel Davis, and Detective Dan Davis. For clarity, the State will refer to Daniel Davis by his first name and will refer to defendant Damien Davis as defendant Davis.

firearm. CP[2] Davis 370-372; CP Reed 1-3. Abrejera and Daniel both resolved their cases before trial and testified against defendants Davis and Reed. RP 725, 1294. A notice of persistent offender was filed against defendant Reed, alleging that he was facing a possible life sentence. CP Reed 4. Defendant Reed was later charged by amended information with murder in the first degree (firearm enhanced), robbery in the first degree (firearm enhanced), two counts of assault in the second degree (firearm enhanced), burglary in the first degree (firearm enhanced), and unlawful possession of a firearm in the first degree. CP Reed 47-50. Defendant Davis was charged by amended information with murder in the first degree (firearm enhanced), two counts of robbery in the first degree (firearm enhanced), unlawful possession of a firearm in the second degree, and murder in the second degree. CP Davis 374-376.

On May 19, 2014, defendant Davis entered a plea of guilty to the amended information. CP Davis 467-477. By agreement, defendant Davis was permitted to withdraw his plea on May 15, 2015. CP Davis 478-481. Defendant Davis was charged by second amended information on September 22, 2015, with murder in the first degree (firearm enhanced), robbery in the first degree (firearm enhanced), two counts of

[2] Each defendant filed individual and separate designations of clerk's papers. For ease of reference, the State will designate which defendant's clerk's papers it is referencing in its citations.

assault in the second degree (firearm enhanced), burglary in the first degree (firearm enhanced), and unlawful possession of a firearm in the second degree. CP Davis 1-4.

On September 18, 2015, defendant Reed filed a motion to sever his case from defendant Davis, based on ***Bruton v. United States***, 391 U.S. 123, 88 S. Ct. 160, 20 L. Ed. 2d 476 (1968). CP Reed 5-46. The State filed a memorandum regarding proposed redactions of defendant Davis' interview, arguing that redactions would eliminate the need for Davis and Reed to have separate trials. CP Davis 12-50; CP Reed 58-96. The court ultimately ruled that the State's proposed redactions of Davis' statement were appropriate and did not violate ***Bruton***. RP 41-43.

On September 24, 2015, the State filed a memorandum asserting its intention to introduce Daniel and Ariel Abrejera's prior consistent statements for impeachment purposes. CP Reed 192-196.

Defendant Reed was found guilty as charged. CP Reed 401-410. He was sentenced to life without the possibility of release as a persistent offender. CP Reed 571-583. Defendant Reed filed a timely notice of appeal. CP Reed 547-567.

Defendant Davis was found guilty of murder in the first degree, two counts of assault in the second degree, and burglary in the first degree, all with firearm enhancements. CP Davis 312-318. Defendant Davis was also convicted of unlawful possession of a firearm in the second degree,

but that conviction was later dismissed. CP Davis 461. Defendant Davis was sentenced to 642 months in custody. CP Davis 333-347.

a. Motion to Sever

On September 29, 2015, the parties appeared before the trial court to address defendant Reed's motion to sever. RP 17. During argument, the trial court expressed concern about one specific redaction in defendant Davis' statement, which seemed to reference defendant Reed. RP 38. The State agreed that the statement could be removed. *Id.* The court ruled as follows:

> Okay. Folks, the Court is prepared to rule. In *Bruton vs. The United States*, the U.S. Supreme Court held that a defendant was deprived of his confrontation rights under the Sixth Amendment when he was incriminated by a pretrial statement of a co-defendant who did not take the stand at trial. Subsequently, in Richards vs. Marsh, the Supreme Court held that a confession redacted to omit all reference to the defendant fell out—or the co-defendant—fell outside Bruton's prohibition, because the statement was not incriminating on its face.
>
> A later case that came before the Supreme Court, Grey vs. Maryland, is where the prosecution had redacted the nontestifying co-defendant's confession by replacing the defendant's name with a blank space, or the word "deleted." We don't have that in this particular case.
>
> Interestingly, in Grey, the Supreme Court said that they would have reached a contrary result had the confession been tailored to read "me and a few other guys had committed the crime," instead of the format used in Grey, "me, deleted, deleted, and a few other guys."

> The most important case, though, comes out of the 11th Circuit that I think Washington has followed this theme, and in United States v. Gonzales the 11th Circuit Court of Appeals found that a redacted confession implicating a precise number of the confessor co-defendants violated the confrontation clause. Hence, my discussion with Mr. Williams about the other people involved when the only reference that was changed had to do with Mr. Reed.
>
> As I indicated, I don't think either Larry or Vincent has modified or changed the holdings I have just discussed from the United States Supreme Court or the Court of Appeals. I have also reviewed the redactions which have been proposed by the State. Keep in mind that my ruling only goes to whether there is a confrontation clause violation for those redactions.
>
> The standard here is whether there is any direct reference to Mr. Reed, which I find there is not. Within the statement there are at least, I think, two separate places, one referred to by me, one referred to by Ms. Ko, where I believe that it refers to what the 11th Circuit said the exact number of participants, a precise number of the confessor's co-defendants there, but according to Mr. Williams, he believed those portions can be redacted sufficiently such that it would not refer to the exact number of co-defendants.
>
> Based on that then, the redactions with those additions I find do not, or does not violate the confrontation clause, and therefore, I will deny Mr. Reed's Motion to Sever this defendants in this case.

RP 41-43.

The redactions were again addressed after voir dire. RP 122-154. Ultimately, defendant Davis' redacted statement was played for the jury, along with an accompanying transcript. RP 72, CP Davis 482-494; CP Reed 589-601 (exhibit 70A and 70B). Immediately before the tape with

the redactions was played, the court read the jury the following admonition:

> The evidence that you are about to hear is a statement made by Defendant Damien Davis, to law enforcement on April 3rd, 2013. You may consider this statement as evidence against Defendant Damien Davis, but not as evidence against Defendant Marcus Reed.

RP 672.

The same admonition was included in the jury instruction packet read to the jury at the conclusion of the case. CP Davis 258-310 (Instruction #9); CP Reed 347-399.

2. Facts

On March 28-29, 2013, Loretta Pickett was staying at the Morgan Motel in Tacoma. RP 283. Pickett was in her room with her mother when she heard a gunshot followed by a scream that someone had been shot. RP 285. She heard the sound of two people running after the gunshot, followed by the sound of a vehicle leaving. RP 291-292. Pickett saw the victim, later identified as Donald Phily, lying on the ground approximately four rooms away from her. RP 289.

Kelsey Kelly has a child in common with defendant Davis[3]. RP 322. She also had a prior relationship with the victim Donald Phily. RP 323. On the day on the murder Kelly was staying with Phily at the Morgan

[3] Defendant Davis' nickname is "Dirt" or "Dirk" and is occasionally referenced by witnesses as such. RP 1012, 1164.

Motel. RP 324. Davis came to visit Kelly at the motel when Phily had his electronics laid out in the room. RP 326. The electronics included computers, phones, and tablets. RP 327. Davis was there for approximately ten minutes, then left the room. RP 328. Kelly went to sleep and was later woken up to a banging on the motel room door. RP 329. In the room at the time were Kelly, Phily, Mark McGlothlen and Kathy Devine. RP 329-333, 365-366. After the banging, Kelly heard Phily telling the people at the door to leave. RP 332. Kelly could hear that Phily sounded mad. RP 332. The banging continued for a couple of minutes then the door opened from the outside. RP 332-333. Right after the door was opened, a gunshot went off. RP 334. Phily was in front of the door area when the gunshot rang out. RP 353.

As the gunshot rang out, Kelly ran into the bathroom and crouched down. RP 333-334, 353-354. She ran into the bathroom because there was nowhere else to run. RP 335. She saw Phily stumble a few feet and fall. RP 334. One of the people who had entered the room asked Kelly where everything was at. RP 335. Kelly told the person she did not know. *Id.* The person Kelly saw had a gun in his hand and had his face partially covered by his coat. RP 336, 341. When asked how she felt when the man with the gun came into the bathroom, Kelly stated that she was scared. RP 334. The bathroom door was open and Kelly could see the

two people who had entered standing in the main area of the room. RP 338. After Kelly told the person that she did not know where everything was at, they ran out of the room. RP 337. Kelly grabbed her personal belongings from the room and fled the scene. RP 338. She described the whole situation as scary. RP 342.

Mark McGlothen and his girlfriend, Kathy Devine, went to see Donald Phily on March 28, 2013 at the Morgan Motel. RP 365-366. When they arrived at Phily's room, Kelsey Kelly was already there. RP 321, 367. McGlothen browsed five or six cell phones that Phily had in the room because he was in the market for a new one. RP 369-370. He saw that Phily also had laptop computers, a smart phone, and broken computer parts in a wicker basket in the room. RP 370.

At approximately 11:30 p.m., McGlothen heard a loud knock at the door. RP 371. Phily asked who it was at the door, but the person did not give his name. RP 372. Phily told the person to go away, but Kelly went to the door and turned the knob, which flew open. RP 373-375. McGlothen saw two men enter the room. RP 376. One man had a pistol and within seconds of entering the room, used the pistol to shoot Phily. *Id.* Phily was armed with a box cutter but did not start toward the door. RP 383. The shooter then told McGlothen "Give me anything you got" and put the gun in McGlothen's face. RP 377. While the shooter was demanding property from McGlothen, the other individual was having

Kelly and Kathy Devine gather the electronics from the room into a basket. RP 377. When the men left, the man without the gun was carrying the basket. RP 394. McGlothen told the shooter that he did not have anything, at which time the shooter turned his attention to Kelly, who went into the bathroom. RP 378. McGlothen saw the two men loading electronic items into the basket. RP 378. McGothen's cell phone was in the room before the intruders entered but was missing after they left. RP 379. McGothen saw Kelly gather her belongings up and leave. RP 380-381.

Kathy Devine stated that she also observed the wicker basket in Phily's room that contained computer parts. RP 432. Devine heard a knock on the motel room door. RP 433. Phily told her "shit's about to happen" and told Devine to stay where she was and not to move. RP 438. She observed the door fly open and saw a man with a gun come into the room. RP 441. Devine observed Phily and the gunman begin to fight over the gun, then heard the gun fire. RP 441-442. Devine saw Phily fall to the ground. RP 444. The shooter started taking items off of the table. *Id.* As the shooter grabbed for a cell phone in the basket, Devine handed it to him. *Id.* The shooter took the basket and the cell phone with him. RP 445. During this exchange the gun was pointed at Devine, leaving her shocked, angry, and scared. RP 445-446. The second man who entered the room had a gun pointed on Mark McGlothen. RP 448. Devine

identified Daniel as the person who shot Phily. RP 470. She stated that she was worried that she was going to get shot that night, too. RP 486.

On March 29, 2013, at approximately 12:18 a.m., Tacoma Police Sergeant Darren Kelly responded to the Morgan Motel in Tacoma. RP 167-168, 170. Dispatch informed him that there had been a shooting at the motel. RP 174. Sergeant Kelly arrived at Room #8 of the Morgan Motel and found Kathy Devine leaning over a victim on the floor. RP 181. The victim, Donald Phily, was between the bed and the back wall. RP 183. He was already deceased. RP 182, 185.

Dr. Lacy performed the autopsy of Donald Phily. RP 522. Dr. Lacy determined that the gun was shot four to six inches away from Phily. RP 531. The bullet's trajectory was left to right and very slightly upward. *Id.* The gunshot wound caused very significant bleeding inside the chest cavity and was fatal. RP 532. A bundle currency totaling $1,000.00 was found in Phily's shoe. RP 535-536.

Detective Steven Reopelle was assigned as the lead detective. RP 657-658. As part of his investigation, Detective Reopelle interviewed Kelsey Kelly and Kathy Devine. RP 665-666. Kelly described the person holding the gun as being a light-skinned black male, possibly Hispanic or Native, with light colored eyes. *Id.* She reported that he had dark brown hair in loose curls and had a black fleece jacket on. *Id.* Devine's description of the first person was also that of a light-skinned black male

with loose curls. RP 667. Devine stated that the first person had a goatee and a husky build. *Id.*

Kelly described the second person who came in the room as being taller and skinny. RP 666. She stated that the second person was light skinned. *Id.* Devine stated the second person was light skinned and was taller and more slender than the first man. RP 668.

Based on Detective Reopelle's investigation, defendant Davis was determined to be a suspect involved in the incident. RP 669. Davis was located at an apartment on South 12th Street and transported to the Tacoma Police Station for an interview. RP 669-670. In defendant Davis' statement to the police, he admits that he was going to the Morgan Motel to do a "lick." CP Davis 589-601; CP Reed 482-494 (exhibit 70B, page 8). A handgun was acquired. *Id.* Defendant Davis knew Donald Phily and Kelsey Kelly. *Id.* (page 3-4). Defendant Davis and Kelly have a child in common. *Id.* (page 3). Defendant Davis went to the Morgan Motel to see Kelly and his child. *Id.* (page 4). After it was determined that the group wanted to do a "lick" defendant Davis was asked about the people in the room at the Morgan Motel. *Id.* (page 6). Defendant Davis was asked if they could do a "lick" on Kelsey Kelly because she had been known to be around people who had drugs. *Id.* (page 6). It was determined that defendant Davis would go knock on the door to the motel

room, but defendant Davis refused because the people inside would recognize him. *Id.* (page 12-13). Defendant Davis gave the others the motel room number and indicated whose name could be used to get the people inside to open the door. *Id.* (page 17). Defendant Davis waited in the car and heard a gunshot go off. *Id.* (page 24). Daniel ran back to the car and indicated that Donny got shot. *Id.* Daniel also had several cell phones and laptops with him when he returned. *Id.* (page 25). Donald Phily's wallet was also taken that had money inside it. *Id.* (page 28). During the incident in the room, Daniel was injured and bleeding. *Id.* (page 34). In addition to Donald Phily's phone and wallet, the wicker basket of electronics was also taken. *Id.* (page 37). Defendant Davis admitted that he was "down for the lick" but did not for anyone getting shot. *Id.* (page 38). He admitted that he set the robbery up. *Id.* (page 37-38). A "lick' is a term for a robbery. RP 676.

Daniel was the person who accompanied defendant Reed[4] into the motel room at the time of the murder. RP 725-727. Defendant Damien Davis had gone to the Morgan Motel to visit the child he has in common with Kelsey Kelly. RP 742. When defendant Davis returned, he said that his child was not at the room but that there were electronics there. RP

[4] Defendant Reed's nickname is "Magic" and is periodically referred to as such by witnesses. RP 1162.

743. A discussion then occurred about robbing Donald Phily because he had electronics, drugs, and money. RP 745. The plan was to rob Donald Phily. RP 727. Initially, there was discussion of doing a separate robbery of someone else for Percocet pills. RP 746-747. The defendants went to get a gun from defendant Reed's residence. RP 749. The gun was a loaded nine millimeter handgun. RP 751, 762. When the defendants returned, Daniel put the gun in a backpack while they discussed their plan. RP 750-751. They went to pick up Ariel Abrejerea, who was to be their driver. RP 727-728, 753. The target of the Percocet robbery, however, kept changing his mind about where to meet them and so the plan to rob that individual was rejected. RP 753. Once they realized that they would be unable to rob the person with the Percocet pills, the plan was refocused on doing a robbery of Donald Phily. PR 759.

According to Daniel, he, Abrejera, and the two defendants went to the Morgan Motel. RP 761-762. He gave the gun to defendant Reed. RP 764. Together, Daniel and defendant Reed knock on the door at the Morgan Motel and used the name that defendant Davis gave them. RP 765. The plan was that Daniel was going to enter the room first, followed by defendant Reed who was going to brandish the gun. RP 767. The gun was brought to intimidate Phily into giving them items and money. RP 777. Once the door to the room is opened, Daniel pushed himself inside.

RP 769. Defendant Reed followed Daniel into the room and shoot Phily. RP 769-772. Defendant Reed kept saying "I'm sorry" and Kelly ran into the bathroom. RP 773. Defendant Reed and Daniel grabbed electronic items from the room and flee. *Id.*

Defendant Davis told the other three—Abrejera, Daniel, and defendant Reed—that Phily had money, drugs and electronics in his room at the Morgan Motel. RP 759. Defendant Davis came up with the plan. RP 1034. All four then got in the car and drove there. *Id.* Daniel had the gun with him but gave it to defendant Reed before they went inside the room. RP 762, 764. Davis indicated the purpose of bringing the gun was to intimidate Phily into giving them his property. RP 777. Abrejera was the driver and defendant Davis did not want to go to the room because the people inside knew him. RP 761. That left defendant Reed and Daniel to go into the room. *Id.* Defendant Reed and Daniel knocked on the door of the motel room indicated by defendant Davis and asked for "Keith," because that was the name defendant Davis had told them to use. RP 765. The door was opened and Daniel pushed his way inside. RP 768. Daniel and Phily were about to fight inside the room when the gun went off. RP 771-772. Davis "might have" observed Kelly run into the bathroom and Davis ran after her to apologize. RP 773. Davis grabbed electronic items that were on the bed and left the room. *Id.* Defendant Reed took a wicker

basket full of miscellaneous items from the room. RP 780. In addition to Phily and Kelly, Davis saw two other people in the room. RP 774. The proceeds from the robbery were later divided up, with the defendants taking all of the money from Phily's wallet. RP 804-805.

Ariel Abrejera stated that defendant Reed was like a brother to her. RP 1294. She stated that on the day of incident she was picked up by the defendants and Daniel. RP 1298. She overheard defendant Davis telling Daniel about a name he had to use to get into the room. RP 1300. She saw a firearm sitting on Daniel's lap. RP 1302. Abrejera drove the group to the Morgan Motel and Daniel and defendant Reed exit the car. RP 1304-1305. Abrejera heard a "faint pop" and Daniel and defendant Reed returned with a wicker basket of miscellaneous junk. RP 1309. She then drove everyone back to Davis-Orr's apartment. RP 1310. Abrejera took the bag containing the murder weapon and put it in the trunk of her car. RP 1381. Later, Abrejera took the murder weapon out of the bag, put her own gun into the bag, and hid the murder weapon in some woods. RP 1387-1389. The gun was later found by an eleven year old child. RP 1452-1453. The gun was determined to be operational, and could not be excluded as the gun that was used to shoot Phily. RP 1538, 1540. The gun had been reported as being purchased by Danny Lee Evans, defendant Reed's former father-in-law. RP 1548, 1552. After defendant Reed was

arrested, he began writing Abrejera letters expressing his love for her and wanting to marry her. RP 1392-1393.

Crystal Palamidy, who was present at the apartment where the proceeds of the robbery were brought, recalled seeing broken cell phones, a computer tablet and "a bunch of junk" that was taken during the robbery. RP 1103-1104. Shawn Conklin also observed the proceeds of the robbery and saw a prepaid VISA gift card in the name of Donald Phily. RP 1174. Conklin also heard defendant Reed state, "I got that nigga" after the robbery. RP 1173. Melynda Davis-Orr, Davis' half-sister was present both before and after the robbery and murder. RP 1210. When the group returned, Daniel had an injury to his arm which she believed to be a gunshot wound. RP 1213. Davis-Orr saw a wicker basket of electronics after she was done treating Davis' wound. RP 1218. She observed tablets, broken computers, cell phones, and a phone that belonged to Donald Phily. RP 1219. Daniel eventually told Davis-Orr that he, defendant Reed, and defendant Davis did the Morgan Motel shooting. RP 1222.

C. ARGUMENT.

1. ANY CHALLENGE TO THE FINDINGS OF FACT AND CONCLUSIONS OF LAW FROM THE CrR 3.5 HEARING FAIL AS NO ERROR WAS ASSIGNED TO ANY FINDINGS, TRIAL COUNSEL SIGNED THE PROPOSED FINDINGS, AND DEFENDANT DAVIS CANNOT ESTALBISH ANY PREJUDICE. (raised by Davis only)

a. No error was assigned to the findings of fact entered by Judge Schwartz and therefore they are verities on appeal.

The findings of fact entered following the CrR 3.5 hearing are unchallenged by defendant. Unchallenged findings of fact are verities on appeal. ***State v. Levy***, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006); *see also* ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 808, 828 P.2d 549 (1992). In this case, defendant Davis fails to assign error to any findings of fact that were found by Judge Felnagle or ratified by Judge Schwartz. Therefore, defendant Davis is not entitled to relief.

b. Any error in Judge Schwartz reviewing the transcript of the prior CrR 3.5, conducting his own analysis, and entering findings is waived as invited error when defense counsel signed the court's findings and conclusions.

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. ***State v. Thetford***, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); ***State v. Hettich***, 70 Wn. App. 586,

592, 854 P.2d 1112 (1993). The invited error doctrine prohibits a party from setting up an error in the trial court then complaining of it on appeal. ***State v. Studd***, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); ***State v. Henderson***, 114 Wn.2d 867, 870, 792 P.2d 514 (1990); ***State v. Neher***, 112 Wn.2d 347, 352–53, 771 P.2d 330 (1989). In this case, the trial counsel for defendant Davis signed the findings of fact and conclusions of law. CP Davis 348-351. Judge Schwartz made it clear that he was not ordering the parties to sign, but that if the parties were asking the court to sign he would do so. The court stated:

> I did read through the transcript, as well as the State's Findings of Fact and Conclusions of Law. When the parties think they are prepared to ask the Court for either a signature of some other action, please let me know.

RP 155-156.

Presumably, thereafter the parties presented the findings of fact and conclusions of law, which are signed by the attorney for defendant Davis. CP Davis 348-351. Because defendant Davis did not object to this procedure below and, in fact, indicated his agreement by signing the proposed findings and conclusions, defendant Davis cannot now complain that the procedure was done in error. Under the doctrine of invited error, he should be precluded from relief.

c. Defendant Davis cannot establish any prejudice in Judge Schwartz reviewing the prior record from the CrR 3.5 hearing and signing findings of fact and conclusions of law.

Defendant Davis has also failed to articulate any resulting prejudice when Judge Schwartz reviewed the record made in front of Judge Felnagle, conducted his own review of the record, and signed findings of fact and conclusion of law. Arguments unsupported by applicable authority and meaningful analysis should not be considered. ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); ***State v. Elliott***, 114 Wn.2d 6, 15, 785 P.2d 440 (1990); ***Saunders v. Lloyd's of London***, 113 Wn.2d 330, 345, 779 P.2d 249 (1989); ***In re Disciplinary Proceeding against Whitney***, 155 Wn.2d 451, 467, 120 P.3d 550 (2005)(*citing* ***Matter of Estate of Lint***, 135 Wn.2d 518, 532, 957 P.2d 755 (1998)(declining to scour the record to construct arguments for a litigant); RAP 10.3(a). This is not a matter constitutional magnitude. Because defendant Davis cannot establish prejudice, his argument fails.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT DENIED DEFENDANT REED'S SEVERANCE MOTION AFTER IT WAS SATISFIED THAT THE FINAL REDACTIONS COMPLIED WITH THE CONFRONTATION CLAUSE; EVEN IF ERROR OCCURRED, IT WAS HARMLESS GIVEN THE OVERWHELMING EVIDENCE. (*raised by Reed only*)

a. The trial court properly exercised its discretion in admitting the statement of defendant Davis and omitting any direct references to defendant Reed.

Severance of jointly charged defendants based on a statement by one that incriminates the other is not required where "deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement." CrR 4.4(c)(1). This rule "was adopted to avoid the constitutional problem dealt with in ***Bruton* v. United States**, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968)." ***State v. Hoffman***, 116 Wn.2d 51, 75, 804 P.2d 577 (1991). Under the rule, severance motions are addressed to the trial court's discretion and review is for abuse of discretion. ***State v. Campbell***, 78 Wn. App. 813, 819, 901 P.2d 1050, 1054 (1995), citing ***State v. Grisby***, 97 Wn.2d 493, 506, 647 P.2d 6 (1982), *cert. denied*, 459 U.S. 1211, 103 S. Ct. 1205, 75 L. Ed. 2d 446 (1983).

Separate trials are not favored in Washington. ***State v. Grisby***, 97 Wn.2d 493, 506-07, 647 P.2d 6 (1982), *citing* ***State v. Ferguson***, 3 Wn.

App. 898, 906, 479 P.2d 114 (1970), *review denied*, 78 Wn.2d 996 (1971). Separate trials "should be required only in those instances in which an out-of-court statement by a codefendant expressly or by direct inference from the statement incriminates his fellow defendant." *Id.* quoting ***State v. Ferguson***, 3 Wn. App. 898, 906, 479 P.2d 114 (1970). "A limiting instruction is ineffective and severance is appropriate only when testimony includes 'powerfully incriminating extrajudicial statements of a codefendant.'" ***State v. Campbell***, 78 Wn. App. 813, 819, 901 P.2d 1050 (1995), *quoting* ***State v. Dent***, 123 Wn.2d 467, 486, 869 P.2d 392 (1994) *quoting* ***Bruton v. United States***, 391 U.S. 123, 135–36, 88 S. Ct. 1620, 1628, 20 L. Ed. 2d 476 (1968).

Judicial economy is a valid concern when a trial court rules on a severance motion. "Trial courts properly grant such severance motions only if a defendant demonstrates that a joint trial would be 'so manifestly prejudicial as to outweigh the concern for judicial economy.'" ***State v. Johnson***, 147 Wn. App. 276, 283-84, 194 P.3d 1009 (2008) *citing* ***State v. Hoffman***, 116 Wn.2d 51, 74, 804 P.2d 577 (1991), *quoting* ***State v. Philips***, 108 Wn.2d 627, 640, 741 P.2d 24 (1987). "A 'defendant must be able to point to specific prejudice' to demonstrate that the trial court abused its discretion." *Id.*, *quoting* ***State v. Grisby***, 97 Wn.2d 493, 507, 647 P.2d 6 (1982).

The severance motion in this case turned on the trial court's determination that defendant Davis' statement could be successfully

redacted to meet the requirements of the confrontation clause. Alleged confrontation clause violations case are reviewed *de novo.* ***State v. Larry***, 108 Wn. App. 894, 901-02, 34 P.3d 241, 246, *review denied*, 107 Wn.2d 1049 (2001), *citing* ***United States v. Mayfield,*** 189 F.3d 895, 899 (9th Cir., 1999) and ***United States v. Hoac,*** 990 F.2d 1099, 1105 (9th Cir., 1993), *accord*, ***State v. Medina***, 112 Wn. App. 40, 50-51, 48 P.3d 1005, *review denied,* 147 Wn.2d 1025 (2002).

State v. Larry, 108 Wn. App. 894, 34 P.3d 241 (2001), *review denied*, 146 Wn.2d 1022 (2002), arose from an abduction, robbery, and shooting of a restaurant manager by two defendants. *Id.* at 899-900. Because there were only two defendants, and because only one of them made a statement to the police, the redaction of the statement was a critical issue. The ***Larry*** court carefully examined the requirements of the confrontation clause, starting with authority from the United States Supreme Court, and including a review of divergent authority from the federal circuit courts. *Id.* at 902-04. Ultimately ***Larry*** upheld the trial court's decision to deny severance and redact the statement of the non-moving defendant. *Id.* at 907. Notably, in ***Larry***, there were only three individuals involved in the case—two defendants and the victim. Therefore, when one defendant's statement is introduced it would logically follow that the redactions reference the second defendant.

The Washington Supreme Court recently addressed a similar issue in ***State v. Fisher***, 185 Wn.2d 836, 374 P.2d 1185 (2016). In ***Fisher***, two

defendants—Fisher and Trosclair—were tried together, with Fisher having made out-of-court statements incriminating both herself and Trosclair. *Id.* at 839. The court held that that the admission of Trosclair's statements was done in error because there were only two participants in the crime, the co-defendant's first name was not redacted on two separate occasions, and that the only other possible person that "the other guy" could be referring to was the co-defendant. *Id.* at 846.

In this case, however, there were at least *four* participants in the crime—defendant Reed, defendant Davis, Daniel, and Ariel Abrejera. The statements from defendant Davis could easily have been referencing Daniel, not Reed. In ***State v. Medina***, 112 Wn. App. 40, 48 P.3d 1005 (2002), cited with approval by the court in ***Fisher***, the court approved the admission of a co-defendant's statement where the redactions were varied (i.e. "other guys," "the guy," "a guy," "one guy," and "they"). The court held that because there were six possible participants, it would be impossible for the jury to clearly infer that the statements referenced one specific person. *Id.* at 51. In this case, it would also be difficult, if not impossible, for a jury to infer that defendant Davis was referring exclusively to defendant Reed. Defendant Reed asserts that Reed had been helping his sister move, and therefore the "he" that defendant must have been referencing was Reed. Such argument is without merit—it is just as likely that Daniel had a sister as well and that he was the person being referenced. Because there were so many participants in this crime,

it would have been impossible for the jurors to determine that the redactions could have only referenced defendant Reed. The redactions never implicate defendant Reed. Because they were all neutral and, unlike ***Fisher***, did not reference Reed directly or indirectly, his claim fails.

b. Even if the trial court abused its discretion in allowing the neutral redactions, any such error would be harmless given the overwhelming evidence against defendant Reed.

In ***State v. Fisher***, 185 Wn.2d 836, 374 P.2d 1185 (2016), the court specifically held that any confrontation clause violation was rendered harmless by overwhelming evidence. *Id.* at 847-848. The court held:

> Confrontation clause violations are subject to harmless error analysis. *State v. Lui*, 179 Wash.2d 457, 495, 315 P.3d 493, *cert. denied*, __ U.S. __, 134 S.Ct. 2842 ,189 L.Ed.2d 810 (2014). An error is harmless if we are persuaded beyond a reasonable doubt that the jury would have reached the same result in the absence of the error. *State v. Watt*, 160 Wash.2d 626, 635, 160 P.3d 640 (2007). The test is whether the untainted evidence was so overwhelming that it necessarily leads to a finding of guilt. *Lui*, 179 Wash.2d at 495, 315 P.3d 493. Here, the untainted evidence against Trosclair was overwhelming. Trosclair related the murder to his cellmate in detail. An eyewitness identified Trosclair in a photo lineup as one of the perpetrators at the scene. Another eyewitness identified him as the perpetrator with a gun. Cell phone records placed Trosclair with Steele at the scene and showed Trosclair contacted Masten moments before the shooting. We conclude that the confrontation clause error was harmless beyond a reasonable doubt.

Id. at 847-848.

Similarly, the evidence against Reed was also overwhelming. Defendant Reed can be seen on video pounding on the motel room door. CP Davis 482-494; CP Reed 589-601 (exhibits #56-60). The video shows Reed pulling the gun out and shows him entering the motel room with Daniel. CP Davis 482-494; CP Reed 589-601 (exhibits #56-57). Ariel Arebejera testified that she drove defendant Davis, Daniel, and defendant Reed to the motel room and that defendant Reed and Daniel exited. RP 1304-1305. Daniel also testified that he went into the motel room with defendant Reed. RP 769-772. The firearm that was used to shoot Phily belonged to his ex-wife, who stated that defendant Reed took it from her. RP 1591.

Defendant Reed also alleges that the redactions are insufficient because it suggests that a vehicle belonging to defendant Reed was used for the crime. Opening Brief of Reed, page 19. Again, however, video evidence already established that fact. The surveillance video from the Rite Aid and McDonalds near the Morgan Motel shows defendant Reed's vehicle being used. RP 730, 1297, 1097, 1297, 1553-1554, 1565, 1619, 1621. The video evidence showed defendant Reed wearing distinctive pants which were later found in his hamper. RP 684, 1585-1586. Daniel identified himself and defendant Reed on the surveillance video from the Morgan Motel. RP 824.

Even if this court were to find that the redactions to defendant Davis' statement were insufficient, they arguably implicate defendant Reed by placing him at the motel room—something multiple other witnesses and a surveillance video do independently. Any error resulting in a confrontation clause violation is harmless. Moreover, as was done in ***Fisher***, *supra*, where harmless error was found, a limiting instruction was given in this case instructing the jury to consider defendant Davis' statements only as they relate to defendant Davis, not to defendant Reed. CP Davis 258-310; CP Reed 347-399 (instruction #9). In fact, the jury was instructed twice that the statement from defendant Davis was only to be considered as evidence against defendant Davis—*not* against defendant Reed. Immediately before the statement was published, the trial court advised the jury:

> Yes. Before you do, ladies and gentlemen, I have an instruction for you. Please listen closely. The evidence that you are about to hear is a statement made by Defendant Damien Davis, to law enforcement on April 3rd, 2013. You may consider this statement as evidence against Defendant Damien Davis, but not as evidence against Defendant Marcus Reed. Okay.

RP 672.

At the conclusion of the case, in the court's instructions to the jury, the court again instructed the jury that they were to consider the statement only against defendant Davis, not defendant Reed. CP Davis 258-310; CP

Reed 347-399 (instruction #9). Because the evidence was overwhelming and the jury was twice instructed to consider the evidence against defendant Davis only, any error was harmless.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING TESTIMONY ABOUT THE IMPRESSIONS OF DAVIS-ORR WHEN IT WAS EXPLORED ON CROSS EXAMINATION, WAS ADMITTED AS PROPER REHABILITATION, AND WAS NOT IMPROPER OPINION TESTIMONY ABOUT DEFENDANT REED'S GUILT. *(raised by Reed only)*

a. Facts regarding Davis-Orr's testimony

Melynda Davis-Orr is Daniel's half-sister. RP 1201. She was present both before and after the robbery and murder. RP 1210-1213. Crystal Palamidy was Davis-Orr's neighbor. RP 1208. On the night of the murder, the defendants and Daniel were at Davis-Orr's apartment. RP 1210. Davis-Orr recalled on direct examination that the group was discussing doing a lick and then they left. RP 1212-1213. When the group returned, Daniel had an injury to his arm which she believed to be a gunshot wound. RP 1213. Davis-Orr saw a wicker basket of electronics after she was done treating Davis' wound. RP 1218. She observed tablets, broken computers, cell phones, and a phone that belonged to Donald Phily. RP 1219. Daniel eventually told Davis-Orr that he,

defendant Reed and defendant Davis did the Morgan Motel shooting. RP 1222. On cross examination, Davis-Orr admitted that she did not tell the police that she had heard anyone say they were going to do a lick. RP 1248. She also stated that she could not recall who specifically stated something about a lick. RP 1263. She later stated that she could not recall if someone said they were going to do a lick. RP 1267. On redirect, Davis-Orr testified that based on her observations, she assumed they had done a robbery that night. RP 1267.

During Davis-Orr's testimony, each defendant raised an objection to Davis-Orr's testimony. RP 1266-1267. Defendant Davis (who is not raising this claim) objected to the evidence being improper opinion testimony. RP 1267. Defendant Reed only objects to the evidence as "speculation." RP 1266. Either trial counsel requested to be heard outside the presence of the jury. It was only after testimony had concluded that defendant Davis joins in defendant Reed's objection that the testimony is improper opinion testimony. RP 1273. The court rejected the argument, finding as follows:

> And if you are just looking at the testimony in a vacuum, you may be correct. However, because what the State did was an attempt to rehabilitate a witness who expressed herself, and also demonstrated consistent poor memory about the events of that particular night, based on the questions that were asked by defense counsel, I believe that

the statement there was proper in the form of rehabilitation, given what the cross-examination was.

I understand you are not moving for a mistrial. If you want the Court to give some sort of limiting instruction to the jury, the Court would certainly be open to that.

RP 1275.

b. Assuming arguendo, that defendant Davis did make a timely and specific objection[5], the testimony of Davis-Orr was not improper opinion testimony.

A trial court's ruling on the admissibility of opinion evidence is reviewed for abuse of discretion. ***State v. Blake***, 172 Wn. App. 515, 523, 298 P.3d 769, *review denied* 177 Wn.2d 1010, 302 P.3d 180 (2012). "Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion." ***State v. Quaale,*** 182 Wn.2d 191, 196, 340 P.3d 213 (2014), *citing* ***State v. Demery,*** 144 Wn.2d 753, 758, 30 P.3d 1278(2001).

[5] A party objecting to the admission of evidence must make a *timely* and specific objection in the trial court. ER 103; ***State v. Guloy***, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. ***Guloy***, 104 Wn.2d at 421. In this case, defendant Reed is the only defendant raising this issue. His attorney objected once during the redirect of Davis-Orr on the basis of "speculation." RP 1266. Defendant Davis objected on the basis of "improper speculation and *opinion*." (emphasis added) RP 1267. It is only at the conclusion of Davis-Orr's testimony that defendant Davis joins defendant Reed's argument that the testimony was improper opinion testimony. RP 1273. Because defendant Reed did not raise a timely objection on the basis of improper opinion testimony at the time it was offered, is should be deemed waived.

It is axiomatic that "no witness may 'testify to his opinion as to the guilt of a defendant whether by direct statement or inference.'" ***City of Seattle v. Heatley,*** 70 Wn. App. 573, 577, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011 (1994), *citing* ***State v. Black,*** 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Evidence that is not "a direct comment on the defendant's guilt" does not contravene this principle. ***City of Seattle v. Heatley,*** 70 Wn. App. at 578. Where opinion or inference testimony is not a direct comment on the defendant's guilt, it is admissible where "the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge. . . ." ER 701. ***State v. Madison,*** 53 Wn. App. 754, 760-62, 770 P.2d 662, *review denied*, 113 Wn.2d 1002 (1989).

In this case, Davis-Orr's testimony is in no way an expression of her opinion regarding defendant Davis' guilt. Rather, it was a statement based on her observations—her conclusion based on what she saw and heard the participants doing. RP 1267. Moreover, this line of inquiry arose from questioning not by the State, but the defendant Reed himself. The State elicited on direct examination of Davis-Orr that defendant

Davis, defendant Reed and Daniel were going to "hit a lick" or do a robbery. RP 1211-1212. On cross-examination by defendant Reed, Davis-Orr stated that she did not tell police that she had heard anyone say they were going to do a lick and that she did not hear anyone say that. RP 1248-1249. Under questioning from defendant Davis' attorney, Davis-Orr stated that she did not recall who was talking about doing a lick. RP 1264. On redirect, Davis-Orr indicated that, based on what she was seeing and hearing, she believed the group had done a robbery that night. RP 1267. Nothing in Davis-Orr's testimony was an expression of her opinion as to defendant Reed's guilt, but was rather an expression of her state of mind—that this group had returned to her home after having doing a robbery. Such testimony was properly allowed.

Even if this court were to find that Davis-Orr's statement was improper, any error is harmless. The jury in this case was instructed that they are the sole judges of the credibility of each witness. CP 33. Jurors are presumed to follow the court's instructions. ***State v. Kirkman***, 159 Wn.2d 918, 937, 155 P.3d 125 (2007). The jury judged the credibility of the witnesses in this case and found defendant Reed guilty. Additionally, the court provided an additional instruction to the jury directing them to consider Davis-Orr's statement only for the purpose of evaluating Davis-Orr's own state of mind. CP Davis 258-310; CP Reed 347-399 (instruction #11). This additional instruction, while unnecessary, provided

further clarification to the jurors that they were not to consider the statement for any other purpose.

4. THE CHALLENGED EVIDENTIARY RULING REGARDING DANIEL'S PRIOR STATEMENT TO POLICE WAS A PROPER EXERCISE OF THE TRIAL COURT'S DISCRETION; THE ASSOCIATED TESTIMONY WAS ADMISSIBLE AS A PRIOR CONSISTENT STATEMENT UNDER ER 801(d)(1)(ii). (raised by defendant Davis only)

a. Facts

Daniel testified pursuant to a plea agreement with the State. RP 725, 833. The State did not elicit any testimony from Daniel regarding his plea agreement with the State. Rather, on cross-examination the counsel for defendant Reed asked Daniel repeated questions about his agreement with the State, asked him if it was a "once in a lifetime opportunity, and asked him if he would be looking at 40-50 years less time if he testified against the others. RP 832-833. Daniel was asked about his first interview with the police by defendant Reed's attorney. RP 833. He was also asked about his proffer interview—the interview he gave where he knew he had to be truthful to get a deal. RP 843.

Defense counsel for defendant Reed asked Daniel about his statement to police at the time of his arrest, and showed Daniel the transcript of that statement. RP 879. Defense counsel for Reed repeatedly

used Daniel's statement to police during her cross-examination and used it to impeach Daniel's trial testimony. RP 880-881, 890-891, 897, 900-901, 906-908. Later, counsel asked Daniel about his motivations, "Well, Mr. Davis, did something happen between June of 2014 and October of 2015 that made your memory become better so that now you have a clear recollection of things that you did not in June?" RP 884. Clearly, defense counsel is referencing Daniel's plea agreement and suggesting that is the reason for the change in statements.

Defense attorney for defendant Davis also questioned Daniel about his plea agreement with the State. Counsel for Davis questioned Daniel repeatedly about the statement he gave to police. RP 928, 955, 988-982. In fact, counsel for defendant Davis asked Daniel if the statement he gave to police was false. RP 987. The following exchange then occurred:

Question:	Do you remember what you said at the first recorded statement, versus the second recorded statement, versus the recorded defense interview, versus the unrecorded conversation you had with the detective? They are all blending together at this point, aren't they?
Answer:	Yeah.
Question:	And what you are really hoping to do is convince the prosecutor that you are a helpful witness, so that you can get the deal, right?
Answer:	Not really.

Question:	Aren't you just saying things that you think are going to help to keep you from going to prison for a long time?
Answer:	No.
Question:	Okay. Now, as part of your plea agreement, you had to pled guilty to a number of offenses, including murder and robbery, things of that nature. Do you recall that?
Answer:	Yes, sir.
Question:	And that's correct. And based on what you have pled to, you were looking at 581 months to 728 months, is that correct?
Answer:	Yes.
Question:	Did you work out the years?
Answer:	No, I didn't. But it's pretty close to about 60.
Question:	Yeah. 48.41 years to 60.66 years. Does that sound about right?
Answer:	Yes.

RP 992-993.

The exchange discussing Daniel's plea agreement continued for many more questions. RP 992-995. At the end of the exchange, counsel for defendant Davis asks the following:

Question:	So you are looking at cutting your exposure, that is the time that you are potentially looking at, more than in half, right?
Answer:	Yes, sir.
Question:	And isn't that the primary motivation for you to take the stand and give the statements that you were giving?
Answer:	Yeah.
Question:	And you thought about all of that before you went and talked to Detective Reopelle on April 2nd, didn't you?
Answer:	No, I did not.

Question: You may not have thought about the actual deal you might get, you might not have thought about the actual standard range you thought about, but you certainly thought about making a statement to police to try to save yourself, didn't you?
Answer: Yeah.

RP 995.

Defense counsel for Davis questioned Daniel about the second statement he gave, which was part of his plea agreement, asking him if the second statement became "extremely important" because it was part of his agreement. RP 1001. Daniel was asked if his testimony to the jury was "critical" to him getting his plea deal, and he agreed. RP 1002.

After cross examination of Daniel, the State moved to admit his statement to police as a prior consistent statement under ER 801(d)(1). RP 1468. The State asserted that at no time during its opening statement or direct examination of Daniel did the State introduce that his testimony was required by his plea agreement. *Id.* The State asserted that Daniel's plea agreement was highlighted and emphasized by the defense, suggesting that Daniel's testimony should not be believed because of the plea agreement he entered. *Id.*

Defense counsel for defendant Davis conceded below that, chronologically, Daniel's statement to police occurred before any promise of a plea agreement. RP 1475. He also conceded below that both

defendants attached the credibility of Daniel on cross examination. RP 1476. The court allowed the admission of Daniel's statement to police, finding that it was being offered to rebut a charge of recent fabrication. RP 1479. The court found that both defendants challenged the veracity of Daniel's testimony and found that defense attorneys conceded that they did so. RP 1480. The court also found that Daniel's statement to the police predated any alleged offer of leniency or favoritism. *Id.* The trial court allowed the admission of the transcript of Daniel's prior statement.[6]

b. The trial court properly exercised its discretion in admitting Daniel's prior statement.

Washington's appellate courts will only reverse a trial court's decision on whether to admit or exclude evidence when the ruling was an abuse of discretion. ***State v. Thomas***, 150 Wn.2d 821, 856, 83 P.3d 970

[6] Defendant Davis insinuates that the trial court erred in admitting the transcript versus verbal testimony, but does not assign error to such. Moreover, defense counsel for Davis agrees that there were no additional redactions that were required in order to satisfy the court's motions in limine. Because defendant Davis does not assign error to the trial court's method of admitting the transcripts—review of which would have been an abuse of discretion—the issue is not before this court. Defendant Davis also states that the transcripts improperly contained "Daniel's personal views." Brief of Davis, page 50. Defendant does not specify any specific portions of the transcript that he deems now to be objectionable and did not raise any such specific objections below. Arguments unsupported by applicable authority and meaningful analysis should not be considered. ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); State v. Elliott, 114 Wn.2d 6, 15, 785 P.2d 440 (1990); ***Saunders v. Lloyd's of London***, 113 Wn.2d 330, 345, 779 P.2d 249 (1989); ***In re Disciplinary Proceeding against Whitney***, 155 Wn.2d 451, 467, 120 P.3d 550 (2005)(*citing* ***Matter of Estate of Lint***, 135 Wn.2d 518, 532, 957 P.2d 755 (1998)(declining to scour the record to construct arguments for a litigant); RAP 10.3(a).

(2004) (*citing* ***State v. Swan***, 114 Wn.2d 613, 658, 790 P.2d 610 (1990); ***Reese v. Stroh***, 128 Wn.2d 300, 310, 907 P.2d 282 (1995)). A trial court abuses its discretion if no reasonable person would have decided the matter as the trial court did. ***Thomas***, 150 Wn.2d at 856 (*citing* ***State v. Castellanos***, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997)). This requires a showing that the trial court's evidentiary ruling was "manifestly unreasonable." ***State v. Hughes***, 118 Wn. App. 713, 724, 77 P.23d 681 (2003), *review denied*, 151 Wn.2d 1039 (2004)(*citing* ***State v. Brown***, 132 Wn.2d 529, 571-572, 940 P.2d 546 (1997) *cert denied*, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998)). The unreasonableness is manifest when it is "obvious, directly observable, overt or not obscure...." *See generally* ***State v. Taylor***, 83 Wn.2d 594, 598, 521 P.2d 699 (1974).

ER 801(d)(1)(ii) provides:

> "A statement is not hearsay if—(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is ... (ii) consistent with his testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive[.]"

"Whether a prior statement is admissible under ER 801(d)(1)(ii) is within the trial court's discretion and will not be reversed absent a showing of manifest abuse of discretion. ***State v. Makela***, 66 Wn. App. 164, 168, 831 P.2d 1109, *review denied*, 120 Wn.2d 1014 (1992)(*citing* ***State v. Dictado***, 102 Wn.2d 277, 290 687 P.2d 172 (1984), *overruled on other grounds*,

State v. Harris, 106 Wn.2d 784, 789-790, 725 P.2d 975 (1986); ***State v. Osborn***, 59 Wn. App. 1, 5, 795 P.2d 1174, *review denied*, 115 Wn.2d 1032, 803 P.2d 325 (1990)).

In this case, foundational requirements of ER 801(d)(1)(ii) were satisfied before the challenged testimony was admitted. Daniel was subject to cross-examination. RP 557-572, 575. The challenged statement was consistent with Daniel's trial testimony in many regards and established that he did not fabricate his statement about who participated in the crime. CP Davis 482-494; CP Reed 589-601 (exhibit #114). The challenged testimony also rebutted defendant's charge that Daniel's plea agreement motivated him to testify falsely. A charge of improper influence occurs when a party "raise[s] an inference sufficient to allow counsel to argue the witness had a reason to fabricate her story later." *See* ***Thomas***, 150 Wn.2d at 865; ***Makela***, 66 Wn. App. at 168 (*quoting* ***State v. Bargas***, 52 Wn. App. 700, 702-703, 763 P.2d 470 (1988), *review denied*, 112 Wn.2d 1005 (1989)).[7] Identifying the source of the alleged improper influence is critical to a determination of whether a prior consistent statement is properly admitted under ER 801(d)(1)(ii). *See* ***Thomas***, 150 Wn.2d at 865; ***State v. Walker***, 38 Wn. App. 841, 843, 690 P.2d 1182,

[7] "If there is an inference raised in cross examination that the witness changed her story in response to an external pressure, then whether that witness gave the same account of the story prior to the onset of the external pressure becomes highly probative of the veracity of the witness's story given while testifying." ***Thomas***, 150 Wn.2d at 865 (*citing* ***State v. McDaniel***, 37 Wn. App. 768, 771, 683 P.2d 231 (1984)).

review denied, 103 Wn.2d 1012 (1985); ***Makela***, 66 Wn. App. at 168; ***State v. Bargas***, 52 Wn. App. 700, 702-703, 763 P.2d 470 (1988), *review denied*, 112 Wn.2d 1005 (1989)). Once an event is proffered as having an improper influence on a witness's testimony that charge may be rebutted with a consistent statement made by the witness before the proffered event occurred. *See generally* ***Thomas***, 150 Wn.2d at 865; ***Makela***, 66 Wn. App. at 172-174; *see also* ***State v. Walker***, 38 Wn. App. 841, 843, 690 P.2d 1182 (1985); ***State v. Ellison***, 36 Wn. App. 564, 569, 676 P.2d 531, *review denied*, 101 Wn.2d 1010 (1984); ***United States v. Tome***, 513 U.S. 150, 156, 115 S. Ct. 696, 130 L. Ed. 2d 574 (1995).

Defendant's cross-examination of Daniel is comparable to cross-examination that supported the applicability of ER 801(d)(1)(ii) in ***Thomas***.[8] RP 557-565. Thomas' cross-examination concentrated on how the life sentence attending the witness's initial charge had been reduced by plea agreement to approximately thirty six months. 150 Wn.2d at 865. Thomas coupled that cross-examination with questions that implied the plea agreement motivated the witness to testify falsely. *Id.* Both defendant's cross-examination similarly emphasized that Daniel's plea agreement reduced his exposure from a lengthy prison sentence to just under a year in jail. RP 832-833; 994-995.

> Question: So you are looking at cutting your exposure, that is the time you are potentially looking at, more than in half, right?

[8] 150 Wn.2d at 865.

Answer:	Yes, sir.
Question:	And isn't that the primary motivation for you to take the stand and give the statements that you are giving?
Answer:	Yeah.
Question:	And you thought about all of that before you went and talked to Detective Reopelle on April 2nd, didn't you?
Answer:	No, I did not.

RP 995.

Defendant Davis's summation reasserted that the plea agreement was the reason Daniel accused defendants while testifying:

> But what is even more important is the credibility of Daniel, and his credibility is shot. You cannot believe what Daniel says. There are a couple of reliable statements. We have gone over those. You can't believe what Ariel says. Both of their testimony changed from the time of the initial interviews throughout later interviews, the proffer, and then testimony.

RP 1861.

Defendant challenges the trial court's evidentiary ruling by claiming that Daniel had a motive to falsely accuse the defendants when the charged crimes occurred. Opening Brief of Davis, page 47. That claim is not supported by the record and its truth would not have any bearing on the admissibility of the challenged testimony. *See* ER 801; ***Thomas***, 150 Wn.2d at 865; ***Makela***, 66 Wn. App. at 173.

ER 801(d)(1)(ii) does not require proof that the prior consistent statement was made at a time when the declarant was peculiarly prone to honesty. *See* ER 801; ***Thomas***, 150 Wn.2d at 865; ***Walker***, 38 Wn. App.

841, 843; ***Makela***, 66 Wn. App. at 168,173-174; ***Tome***, 513 U.S. at 157-158. Otherwise "[p]rior consistent statements would become inadmissible every time the party against whom they were offered proffered a motive, however baseless, for the declarant to fabricate the statement at the time [the witness] made it." ***Makela***, 164 Wn. App. at 173.

The record does not demonstrate any abuse of discretion. Both defendants singled the plea agreement out as a motive for Daniel to fabricate his trial testimony in opening statement, laid foundation for that theory through cross-examination and relied on that theory in summation. The trial court acted well within its discretion when it ruled the challenged testimony was admissible to rebut defendant's claim.

Even if defendant could prove his claim of error it would not serve as a ground for reversal since it could not be construed as prejudicial. *See* ***State v. Cunningham***, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). Nonconstitutional evidentiary error is not prejudicial unless, within reasonable probability, had the error not occurred, the outcome of the trial would have been materially affected. *See* ***Cunningham***, 93 Wn.2d at 831; *see also* ***State v. Halstien***, 122 Wn.2d 109, 127, 857 P.2d 270 (1993) (*citing* ***State v. Tharp***, 96 Wn.2d 591, 599, 637 P.2d 961 (1981); ***Bargas***, 52 Wn. App. at 705; ***State v. Stark***, 48 Wn. App. 245, 249-250, 738 P.2d 684 (1987); ***Ellison***, 36 Wn. App. at 569.

Defendant cannot prove that he was prejudiced by the admission of the challenged evidence because that information was independently

presented to the jury. Neither defendant requested a limiting instruction, despite the State offering to sign one, as to that testimony, so it was proper for the jury to consider it for any relevant purpose. RP 1478; *see* ***State v. Myers***, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997) (*citing* ***Lockwood v. AC & S, Inc.***, 109 Wn.2d 235, 255, 744 P.2d 605 (1987)). At worst, the challenged testimony reiterated facts that were already in evidence through the testimony of Daniel himself. *See* ***State v. Stark***, 48 Wn. App. 245, 249-250, 738 P.2d 684, *review denied*, 109 Wn.2d 1003 (1987) (Harmless error when jury was otherwise exposed to the substance of erroneously admitted testimony).

There is also no reason to assume the challenged testimony unduly influenced the jury. The jury was properly instructed on how to evaluate witness credibility and separately instructed on the special concerns attending the testimony of a cooperating accomplice. CP Davis 258-310; CP Reed 347-399 (instruction #7). It is presumed that the jury followed those instructions. *See* ***State v. Weber***, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). Defendant has failed to prove the challenged ruling prejudiced the outcome of his trial.

5. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF ASSAULT IN THE SECOND DEGREE BEYOND A REASONABLE DOUBT FOR BOTH KELSEY KELLY AND KATHY DEVINE. *(raised by both defendants)*

In a criminal case, a defendant may challenge the sufficiency of the evidence before trial, at the end of the State's case in chief, at the end of all of the evidence, after the verdict, and on appeal. ***State v. Jackson***, 82 Wn. App. 594, 607-698, 918 P.2d 945 (1996), *review denied*, 131 Wn.2d 1006 (1997). "In a claim of insufficient evidence, a reviewing court examines whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,' 'viewing the evidence in the light most favorable to the State.'" ***State v. Brockob***, 159 Wn.2d 311, 336, P.3d 59 (2006) (*quoting* ***State v. Green***, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). Thus, sufficient evidence supports a conviction when, viewing it in the light most favorable to the State, a rational fact finder could find the essential elements of the crime beyond a reasonable doubt. ***State v. Cannon***, 120 Wn. App. 86, 90, 84 P.3d 283 (2004).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* (*quoting* ***State v. Myers***, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997)). All reasonable inferences from the evidence must be drawn in favor of the State and

interpreted most strongly against the defendant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Finally, determinations of credibility are for the fact finder and are not reviewable on appeal. ***Brockob***, 159 Wn.2d 336, 311, 150 P.3d 59 (2006); ***State v. Locke***, 175 Wn. App. 779, 788-89, 307 P.3d 771, 776 (2013), *review denied*, 179 Wn.2d 1021 (2014). In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence. ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99, 101 (1980).

To convict defendant of assault in the second degree, the State proved that each defendant, or his accomplice, intentionally assaulted Kelsey Kelly. CP Davis 258-310; CP Reed 347-399 (instruction #34, #35).

Washington defines assault by reference to the common law and acknowledges three kinds: "(1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm." ***State v. Aumick***, 126 Wn.2d 422, 426 n. 12, 894 P.2d 1325 (1995) (*quoting* ***State v. Walden***, 67 Wn. App. 891, 893–94, 841 P.2d 81 (1992)). Proving assault as an attempt to cause fear and apprehension of injury requires a showing of specific intent to create reasonable fear and apprehension of bodily injury. ***State v. Byrd***, 125 Wn.2d 707, 713, 125 P.2d 396 (1995).

Specific intent is the intent "to produce a specific result, as opposed to an intent to do the physical act" that produces the result. ***State v. Elmi***, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). Specific intent cannot be presumed, but it can be inferred as a logical probability from all the facts and circumstances. ***State v. Louther***, 22 Wn.2d 497, 502, 156 P.2d 672 (1945); ***State v. Salamanca***, 69 Wn. App. 817, 826, 851 P.2d 1242, *review denied*, 122 Wn.2d 1020, 863 P.2d 1353 (1993). Intent is rarely provable by direct evidence, but may be gathered, nevertheless, from all of the circumstances surrounding the event. ***State v. Gallo***, 20 Wn. App. 717, 729, 582 P.2d 558, *review denied*, 91 Wn.2d 1008 (1978). Intent "can be inferred as a logical probability from all the facts and circumstances." ***State v. Yarbrough***, 151 Wn. App. 66, 87, 210 P.3d 1029 (2009) (*quoting* ***State v. Wilson***, 125 Wn.2d 212, 217, 883 P.2d 320 (1994)). "Evidence of intent ... is to be gathered from all of the circumstances of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats." ***State v. Ferreira***, 69 Wn. App. 465, 468, 850 P.2d 541 (1993) (*quoting* ***State v. Woo Won Choi***, 55 Wn. App. 895, 906, 781 P.2d 505 (1989), *review denied*, 114 Wn.2d 1002, 788 P.2d 1077 (1990)).

An example of specific intent to cause fear and apprehension is when a person points a gun at another person. A jury may infer specific

intent to create fear from the defendant's pointing a gun at the victim, unless the victim knew the weapon was unloaded, but not from mere display. ***State v. Miller***, 71 Wn.2d 143, 146, 426 P.2d 986 (1967); ***State v. Karp***, 69 Wn. App. 369, 374-75, 848 P.2d 1304, *review denied*, 122 Wn.2d 1005, 859 P.2d 602 (1993); ***State v. Murphy***, 7 Wn. App. 505, 511, 500 P.2d 1276, *review denied*, 81 Wn.2d 1008 (1972).

RCW 9A.36.021(1)(c) provides, in pertinent part, that "[a] person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree... [a]ssaults another with a deadly weapon[.]" *See* CP 136-95.

The jury was correctly instructed that:

> An assault is an intentional touching or shooting of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or shooting is offensive if the touching or shooting would offend an ordinary person who is not unduly sensitive.
>
> An assault is an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP Davis 258-310; CP Reed 347-399 (instruction #31).

The necessary intent for assault may be inferred from pointing a gun at a victim. ***State v. Eastmond***, 129 Wn.2d 497, 500, 919 P.2d 577 (1996), *overruled on other grounds by* ***State v. Brown***, 147 Wn.2d 330, 340, 58 P.3d 889 (2002), *citing* ***State v. Miller***, 71 Wn.2d 143, 146, 426

P.2d 986 (1967). *See also* ***State v. Callahan***, 87 Wn. App. 925, 94 P.2d 676 (1997). The gravamen of assault is putting another in apprehension of harm, whether or not the actor actually intends to inflict or is incapable of inflicting that harm. *See* ***State v. Byrd***, 125 Wn.2d 707, 712-713, 887 P. 2d 396 (1995).

a. When viewed in the light most favorable to the State, there was sufficient evidence for a reasonable trier of fact to convict each defendant of assault in the second degree against Kathy Devine.

Kathy Devine testified that after seeing Phily get shot, the gun was pointed directly at her. RP 445-446. As the court held in ***Eastmond***, *supra*, intent to commit assault may be inferred from pointing a gun at the victim. While defendants now allege that because one of the participants was polite to Devine by telling her "thank you" after she handed him some of the loot, that she was not reasonably placed in fear. Opening Brief of Davis, page 25. On the contrary, Devine had a gun pointed at her, the gun was pointed at others in the room, she had just witnessed Phily get shot, and she stated that she was scared. RP 445-446. She specifically stated she was scared she was going to get shot, too. RP 486. When taken in the light most favorable to the State, there was sufficient evidence to find both defendants guilty of assault in the second degree against Devine.

b. When viewed in the light most favorable to the State, there was sufficient evidence for a reasonable trier of fact to convict each defendant of assault in the second degree against Kelsey Kelly.

In this case, Kelly was in the motel room when defendant Reed and Daniel entered. RP 332-333. Kelly saw Phily get shot and immediately fled into the bathroom out of fear. RP 334-335. Once Kelly was hidden in the bathroom, someone with a gun in his hand—presumably defendant Reed—entered the bathroom and made a demand of Kelly, asking her "where everything was at." *Id.* After the defendants left the motel room, Kelly also flees. RP 338. Kelly testified that she was scared. RP 334. Based on Kelly's testimony and the inferences that can be drawn from it, there is sufficient evidence to support a logical probability that defendant Reed, and by extension his co-defendant, intended to create, and in fact created, a reasonable apprehension of fear of bodily injury in Kelly. Defendant Reed had just shot Phily, he pursued Kelly into the bathroom and, with a gun in his hand, makes a demand for property. When taken in the light most favorable to the State, the defendants are guilty of assault in the second degree against Kelly.

6. ANY CHALLENGE AS TO THE TRIAL COURT'S FAILURE TO GIVE A DEFINITIONAL INSTRUCTION AS TO KNOWLEDGE TO ACCOMPANY JURY INSTRUCTION #20[9] IS WAIVED AND CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL; DEFENDANT DAVIS ALSO CANNOT ESTABLISH AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM WHERE HE SUFFERED NO PREJUDICE. *(raised by defendant Davis only)*

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. ***State v. Thetford***, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); ***State v. Hettich***, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993), *review denied*, 123 Wn.2d 1002 (1994). The invited error doctrine prohibits a party from setting up an error in the trial court then complaining of it on appeal. ***State v. Studd***, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); ***State v. Henderson***, 114 Wn.2d 867, 870, 792 P.2d 514 (1990); ***State v. Neher***, 112 Wn.2d 347, 352–53, 771 P.2d 330 (1989).

In ***State v. Scott***, 110 Wn.2d 682, 757 P.2d 492 (1988), the Washington Supreme Court held that a trial court's failure to give an instruction defining knowledge as an element of accomplice liability was

[9] Defendant Davis asserts that the trial court erred in giving its instruction regarding general knowledge of an accomplice. Brief of Davis, page 26. Defendant Davis indicates that the instruction is #23, but that instruction is the to convict instruction. It appears the instruction was renumbered from the State's proposed instructions. Defendant Davis quotes from instruction #20, but cites to instruction #23. It appears that defendant Davis challenges instruction #23. The State's argument will be confined to that instruction. Moreover, defendant Davis does not assign error to instruction #23, but rather confines his argument to a failure to give an instruction defining "knowledge."

not a constitutional error that could be raised for the first time on appeal. *Id.* at 690. The court held that the failure to instruct on a technical term—knowledge—is not a failure to instruct on an essential element and therefore is not constitutionally required. *Id.*

a. Defendant Davis has waived any challenge as to the trial court's failure to give a definitional instruction as to knowledge.

In this case, defendant Davis concedes that an instruction defining knowledge was not requested by the defense. Opening Brief of Davis, page 28. Defendant Davis asserts that trial counsel was ineffective for failing to propose Washington Pattern Jury Instruction (WPIC) 10.51, which defines "knowledge." Opening Brief of Davis, page 30. While it certainly would have been permissible for the trial court to instruct the jury on the definition of knowledge, its failure to do so does not constitute reversible error.

Defendant Davis, *citing* ***State v. Byrd***, 125 Wn.2d 707, 713-714, 887 P.2d 396 (1995), for the argument that the jury must be instructed as to every essential element. Opening Brief of Davis, page 31. The State agrees with Davis that the jury must be instructed on every essential element, but a technical term is not an essential element. As the court in ***Scott*** held, "we find nothing in the constitution, as interpreted in cases of this or indeed any court, requiring that the meanings of particular terms used in an instruction be specifically defined." ***Scott***, 110 Wn.2d at 691.

Because defendant Davis did not propose an instruction defining knowledge at trial, he is precluded from raising the absence of such instruction for the first time on appeal.

b. Defendant Davis was not prejudiced by the failure to give a definitional instruction as to knowledge and therefore an ineffective assistance of counsel claim fails.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also* ***State v. Thomas***, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also* ***Strickland***, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). There is a strong presumption that a defendant received effective representation. ***State v. Brett***, 126 Wn.2d 136, 198, 892 P.2d 29 (1995),

cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); ***Thomas***, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. ***McFarland***, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. ***State v. Carpenter***, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." ***Strickland***, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation.

Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. ***Strickland***, 466 U.S. at 489.

A defendant must demonstrate both prongs of the ***Strickland*** test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. ***State v. Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

For a finding of ineffective assistance of counsel, the defendant must demonstrate prejudice. To demonstrate prejudice, the defendant must show that the outcome of the trial would probably have been different if counsel had offered the instruction. ***State v. Brett***, 126 Wn.2d 136, 199, 892 P.2d 29 (1995).

In this case, defendant Reed asserts that, had his trial counsel proposed a definitional instruction as to knowledge, he could have "expanded" his closing argument regarding defendant Davis's involvement in the crime, to argue that the jury defendant Davis had no knowledge that this was going to be a robbery. Opening Brief of Davis, page 30-31. Such argument, however, is without merit because it is contrary to the theory that defendant presented. Defendant Davis had told

police that he and the other participants had gone to the Morgan Motel to do a "lick" or a robbery. CP Davis 589-601; CP Reed 482-494 (exhibit 70B, page 8). He also told police that he was "down for the lick" but not for anyone getting shot. *Id.* (page 38). Because defendant Davis's statement to the police had been admitted, and he had admitted his knowledge as to the robbery, it would have been a poor strategic choice to argue that he did not know a robbery was going to take place.

Defense counsel for Davis made the strategic choice, given the evidence of defendant Davis's own statement, to present the theory that defendant Davis had tried to sabotage the robbery plan, not that he lacked knowledge. Defense counsel presented argument consistent with that theory. He argued that defendant Davis did not want to do the robbery. RP 1852. He argued that defendant Davis intentionally sabotaged the robbery attempt by intentionally giving defendant Reed and Daniel a name to use to gain entry in room that he knew would not work because the name he gave was of a person that Phily did not like. RP 1852. Defense counsel argued that defendant Davis was trying to stop the robbery and that he did not want to participate in it. RP 1861. The defense theory was not lack of knowledge, but was rather that he made a good faith effort to prevent the crime. This theory was consistent with the instructions that were given, which stated, in part:

> A person is not an accomplice in a crime committed by another person if he or she terminates his or her complicity prior to the commission of the crime, and either gives timely warning to law enforcement authorities or likewise makes a good faith effort to prevent the commission of the crime.

CP Davis 258-310; CP Reed 347-399 (instruction #21).

Because defense counsel made the strategic decision to advance the theory that defendant Davis made a good faith effort to terminate the crime, he was not prejudiced by the failure to propose a definition of knowledge. It was not consistent with the theory of the case. Because strategic decisions are not subject to review, his claim fails.

7. EACH DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING PROSECUTORIAL ERROR. *(raised by both defendants)*

In a claim of prosecutorial error[10], the defendant bears the burden of establishing that the complained of conduct was both improper and prejudicial. ***State v. Stenson***, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997), *citing* ***State v. Mak***, 105 Wn.2d 692, 726, 718 P.2d 407 (1986) and ***State v. Luvene***, 127 Wn.2d 690, 701, 903 P.2d 960 (1995). Where the issue is error in closing argument, the impropriety analysis must take into account that a prosecutor is permitted wide latitude to argue the facts in evidence, draw reasonable inferences from the evidence and express those inferences to the jury. *Id.* at 727, *citing* ***State v. Hoffman***, 116 Wn.2d 51,

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[10] "'Prosecutorial misconduct' is a term of art but is really a misnomer when applied to alleged mistakes made by the prosecutor during trial." ***State v. Fisher***, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Words such as "misconduct" can have repercussions beyond the case at hand and can over time undermine the public's confidence in the criminal justice system. Both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to reserve the phrase "prosecutorial misconduct" for intentional acts, rather than trial error. *See* American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf (last visited February 16, 2016); National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited February 16, 2016). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. *See, e.g.*, ***State v. Fauci***, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); ***State v. Leutschaft***, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*, 2009 Minn. LEXIS196 (Minn., Mar. 17, 2009); ***Commonwealth v. Tedford***, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa.2008). In responding to appellant's arguments in this case, the State will use the phrase "prosecutorial error." The State urges this Court to use the same phrase in its opinions.

94–95, 804 P.2d 577 (1991), *cert. denied*, 523 U.S. 1008 (1998) and ***State v. Fiallo–Lopez***, 78 Wn. App. 717, 726, 899 P.2d 1294 (1995).

Furthermore the prosecutor's argument is examined "in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given." ***State v. Gregory***, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006), *overruled on other grounds*, ***State v. W.R.***, 181 Wn.2d 757, 336 P.2d 1134 (2014) (Prosecutor's argument that "[victim] has come in here to be 100 percent honest" was not improper in light of the prosecutor's review of the evidence of the victim's admissions, and where "[i]n context, it is clear that the prosecutor was not personally vouching for the credibility of [the victim]."), *citing* ***State v. Russell***, 125 Wn.2d 24, 85–86, 882 P.2d 747 (1994).

Where a defendant objects, the standard of review is abuse of discretion. ***State v. Gregory***, 158 Wn.2d at 809. If impropriety is established, prejudice is established only where "there is a substantial likelihood the instances of misconduct affected the jury's verdict." ***State v. Dhaliwal***, 150 Wn.2d 559, 578, 79 P.3d 432 (2003), *quoting* ***State v. Pirtle***, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). Where no objection is made, a defendant is deemed to have waived any error and must show not only improper conduct and prejudice, but must further show that the alleged error was so flagrant and ill-intentioned that an instruction could

not have cured the resulting prejudice. ***State v. Emery***, 174 Wn.2d 741, 760-61, 754, 278 P.3d 653 (2012).

In the present case, the defendant Davis argues that the State committed error in five ways. Opening Brief of Davis, p. 33-42. He is incorrect. This argument was adopted by defendant Reed. Opening Brief of Reed, page 25.

a. The State did not misstate the law when arguing that if each defendant were part of a robbery, then they are guilty of all charged offenses, and even if it were a misstatement of the law, any error was harmless. (Not objected to by defendant Davis).

During the State's closing argument, the State asserted that the defendants are guilty of robbery and of all of the other crimes committed during the course of the robbery. RP 1787. The State's comment was as follows:

> Now, let's focus on the central issue in this case. There is really only one, because when you think about this central issue, you came to realize that if Damien Davis and Marcus Reed were party to a robbery, they are guilty of the charged offenses here. If they were party to a robbery, their guilt as to each of these offenses flows naturally.

RP 1787.

The defendants assert at the State was making a legal argument, when it is clear the State was making a factual one. In context, the State argues that the defendants were both participants in this plan to rob

Donald Phily. They agree to go to his hotel room. They know from defendant Davis that there are likely going to be other people in the room. It is a valid argument that, during the plan to commit this robbery, they would have to assault Phily or someone else or burglarize the room. This argument does not provide the jury with a legal analysis of accomplice liability or of felony murder, but is rather argument that both defendants were fully aware of what crimes they would need to commit in order to effectuate their plan. The jury was properly instructed as to the elements of each offense and they are presumed to follow the court's instructions. They were also instructed to consider each crime separately. CP Davis 258-310; CP Reed 347-399 (instruction #13).

In defendant Reed's closing argument, this is further addressed by defense counsel who disagreed that if defendant Reed was guilty of one crime the rest of the charged crimes "naturally flowed." RP 1821-1822. Defense counsel further directs the jury to the instructions which advise them to consider each count separately. RP 1822.

b. The State did not misstate the law when arguing that Kelly and Devine were victims of assault in the second degree when they witnessed an invasion robbery and had guns pointed at them, and even if such comment was improper, it was not objected to by either defendant.

In ***State v. Asaeli***, 150 Wn. App. 543, 208 P.3d 1136, *review denied*, 167 Wn.2d 1001 (2009), the defendant shot his victim in the driver's seat of a vehicle. *Id.* at 549. A friend of the victim was in the backseat of the victim's vehicle at the time. *Id.* The defendant was charged with, among other offenses, assault in the first degree of the backseat passenger. *Id.* at 581-582. Evidence was presented that the backseat passenger had seen at least two bullets come through the car's window and that she got down on the backseat after the shooting. *Id.* She did not specifically testify that she was afraid she would be shot or injured. *Id.* The court held that the fact that the backseat passenger was aware of the gunfire and only then took cover creates a "very strong" inference that the shooting created an apprehension of imminent fear of bodily injury. *Id.* The court held that there was "no doubt that this fear was reasonable given the circumstances." *Id.*

The State made an argument using the rationale similar to that adopted by this court in ***Asaeli***. The State argued as follows:

> If I shoot someone in your presence, guess what? You are scared out of your mind that you might be next.

RP 1813.

In rebuttal, the State further argued that Devine and Kelly are victims of assault because they were present in the room when defendant Reed and Daniel come inside and shoot Phily. RP 1889. The State then immediately addresses the definition of assault as it relates to Devine and Kelly.

This argument—that shooting someone in the presence of someone else would create a reasonable fear and apprehension in that person—is a lawful argument, and the court found that being in the presence of someone else who had been shot was sufficient to support an assault charge in ***Asaeli***[11]. The defendants allege that assault in the second degree requires more than just "barging" into a hotel room and shooting someone. Opening Brief of Davis, page 35. While the State respectfully disagrees that more would be required, more was presented in this case. In this case, both Devine and Kelly testified that they were scared. RP 334, 445-446. Devine actually had a gun pointed at her and Kelly fled into the bathroom. *Id.* Property was demanded of Kelly. RP 335. Devine stated that she was worried she was going to get shot, too. RP 486. The defendants argument is without merit.

In addition to this argument being proper, the State's argument was also not objected to by either defendant. Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark

[11] 150 Wn. App. 543, 208 P.3d 1136 (2009).

is deemed so "flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." ***Stenson***, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *citing* ***State v. Gentry***, 125 Wn.2d at 593-594, 888 P.2d 1105 (1995).

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. ***State v. Russell***, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994) *citing* ***State v. Graham***, 59 Wn. App. 418, 428, 798 P.2d 314 (1990). "Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." ***Russell***, 125 Wn.2d at 86, *citing* ***State v. Dennison***, 72 Wn.2d 842, 849, 435 P.2d 526 (1967). The prosecutor is entitled to make a fair response to the arguments of defense counsel. ***Russell***, 125 Wn.2d at 87.

"Without a proper timely objection at trial, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill-intentioned that no curative jury instruction could have corrected the possible prejudice." ***State v. Curtiss***, 161 Wn. App. 673, 250 P.3d 496 (2011); ***State v. Larios-Lopez***, 156 Wn. App. 257, 260, 233 P.3d 899 (2010) (citing ***State v. Gregory***, 158 Wn.2d

759, 841, 147 P.3d 1201 (2006) (quoting ***State v. Stenson***, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998)). This is because the absence of an objection "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." ***State v. Swan***, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). Because this argument by the State was not objected to, the defendants have a higher burden—one they cannot meet. The defendants must prove, even if the comment was improper, that it was so flagrant and ill-intentioned that a curative instruction would not have cured it. The defendants cannot meet that burden and their claim fails.

c. The State did not commit prosecutorial error by making an argument involving a puzzle when the argument did not quantify or trivialize the State's burden of proof. (not objected to by defendant Davis)

The State argued in closing:

> Let me go back to where I was when we broke. We are talking about proof beyond a reasonable doubt, and I'm offering you an analogy that may or may not make sense to you or be helpful. Think about going on a ferry, and for those that have gone on a ferry, oftentimes there are puzzles on a table left behind. Sometimes the boxes are there, sometimes they are not. Imagine no box, and so you don't know what the image is. You sit down to do a puzzle and you are putting it together and there are pieces and you just don't know what to do with them. You have tried it on every conceivable spot. You can't figure it out, so you set it aside.

> There may have been pieces of the puzzle that, frankly, were gone before you even sat down to do the puzzle. You may at some point get to the point of putting together that puzzle and realize what the image is. And you are confident beyond a reasonable doubt as to what that image is, even though, maybe again, there were pieces that disappeared before you even sat down, even though there are pieces that you had to set aside because you don't know what to do with.
>
> Now, take that concept and think about this trial, because a trial is in many respects like putting together a puzzle. You are offered a large quantity of evidence, like pieces of a puzzle, and those pieces of evidence are intended to be put together in such a fashion that when you review them in total there is an image that convinces you beyond a reasonable doubt as to the defendant's guilt. You may have pieces of evidence, like pieces of a puzzle, you just don't know what to do with, right? It may be an entire witness's testimony that you just can't make heads nor tails of. It may be only parts of a witness's testimony that you just can't make heads nor tails of, so that witness or what he or she had to say, you just disregard.
>
> Likewise, there may be pieces of evidence or pieces of a puzzle that you never receive in the first place, that you can conceive that might exist out there somewhere in the ether, but you didn't hear about it. And yet, still the question for all of you is the evidence that you have received, those pieces of the puzzle, when you have put all of that evidence together are you convinced beyond a reasonable doubt as to the image? And the image here is the defendant's guilt of the charge crimes. So I offer that to you as one way to think about proof beyond a reasonable doubt.

RP 1876-1787.

In ***State v. Fuller***, 169 Wn. App. 797, 282 P.3d 126 (2012), this court found that a similar argument was permissible. In ***Fuller***, the State used the jigsaw puzzle argument as follows:

> What I am going to do now is use a jigsaw puzzle to illustrate the concept of beyond a reasonable doubt.... We get a few of the pieces of the puzzle.... [W]e might think it looks like Tacoma, but we don't know—
>
> ... [W]e do not have enough pieces of enough evidence beyond a reasonable doubt that it's [a picture] of Tacoma. But let's say we get some more pieces.... But we may not yet have enough pieces, enough evidence to know beyond a reasonable doubt that it's Tacoma.
>
> Now, we have more pieces. We have more evidence and we can see beyond a reasonable doubt that this is a picture of Tacoma....
>
> A trial is very much like a jigsaw puzzle. It's not like a mystery novel or CSI or a movie. You're not going to have every loose end tied up and every question answer[ed]. What matters is this: Do you have enough pieces of the puzzle? Do you have enough evidence to believe beyond a reasonable doubt that the defendant is guilty?

Id. at 827.

This court held that the argument in ***Fuller*** was proper, holding that the State neither equated its burden of proof to everyday decision making not quantified the level of certainty needed to be satisfied beyond a reasonable doubt. *Id.* The court further held that the State, as it did in this case, accurately stated that it had to prove every element beyond a reasonable doubt. *Id.*

In ***State v. Curtiss***, 161 Wn. App. 673, 250 P.3d 496, *review denied*, 172 Wn.2d 1012 (2011), this court also upheld a similar argument, holding that "the State's comments about *identifying* the puzzle with certainty before it is complete are ***not*** analogous to the weighing of

competing interests inherent in a *choice* that individuals make in their everyday lives." *Id.* at 509-10 (2011) (emphasis on "not" added). In ***Curtiss***, the deputy prosecutor argued:

> [R]easonable doubt is not magic. This is not an impossible standard. Imagine, if you will, a giant jigsaw puzzle of the Tacoma Dome. ***There will come a time when you're putting that puzzle together, and even with pieces missing, you'll be able to say, with some certainty, beyond a reasonable doubt what that puzzle is: The Tacoma Dome.***

Id. at 509. This Court held that such an argument did not equate proof beyond a reasonable doubt with the certainty required to properly identify a partially-completed puzzle. ***Curtiss***, 161 Wn. App. at 699. Rather, it was a proper "analogy" used "to describe the relationship between circumstantial evidence, direct evidence, and the beyond-a-reasonable-doubt burden of proof." *Id.* In ***State v. Lindsay***, 180 Wn.2d 423, 326 P.3d 125 (2014), a case relied on by the defendants, the burden of proof was quantified by the State in closing argument. *Id.* at 434. In ***Lindsay***, the prosecutor argued:

> [Y]ou put in about 10 more pieces and see this picture of the Space Needle. Now, you can be halfway done with that puzzle and you know beyond a reasonable doubt that it's Seattle. You could have 50 percent of those puzzle pieces missing and you know it's Seattle.

Id. at 436.

This case, however, is analogous to ***Fuller*** and ***Curtiss*** and distinguishable from ***Linsday***. In this case, the prosecutor who gave

closing argument did not equate solving a certain percentage of a puzzle with being convinced beyond a reasonable doubt, and therefore, never misstated the law or minimized his burden of proof. Indeed, under ***Fuller***, 169 Wn. App. at 827, and ***Curtiss***, 161 Wn. App. at 700-701, he committed no misconduct or error whatsoever. The prosecutor in this case merely provided argument regarding reasonable doubt, which he was permitted to do. Hence, these comments were not improper and the defendant has failed to meet his burden of showing prosecutorial error.

Even if this court were to hold that the argument made by the State was improper, this court "presume[s] that the jury follows the court's instructions," *Id.* (*citing* ***State v. Stein***, 144 Wn.2d 236, 247, 27 P.3d 184 (2001)).

This is especially true given other statements made by both prosecutors and the defense. The State told the jury that they must be convinced beyond a reasonable doubt multiple times. RP 1777-1798, 1809, 1811, 1816. The defense also repeatedly told the jury that the elements must be proven beyond a reasonable doubt. RP 1822, 1844, 1847, 1850, 1855, 1856, 1861, 1868, 1875. The State reiterated in rebuttal that it had the burden of proof beyond a reasonable doubt. RP 1896.

In this context, there could be no "substantial likelihood" that the prosecutor's comments regarding a jigsaw puzzle, even if they were to be

construed as improper, "affected the jury's verdict," and therefore, they could not have been prejudicial. ***State v. Yates***, 161 Wn.2d 714, 774, 168 P.3d 359 (2007). This was not a fill-in-the-blank argument where the jury might be urged that in order to acquit they must say, "I don't believe the defendant is guilty because. . . ." ***State v. Johnson***, 158 Wn. App. 677, 684, 243 P.3d 936, 940 (2010), *review denied*, 171 Wn.2d 1013 (2011). By contrast the defense argument strayed closer to the line because it could be argued that it improperly "[purported] to quantify the level of certainty required to satisfy the beyond a reasonable doubt standard . . . ." ***State v. Fuller***, 169 Wn. App. 797, 826-27, 282 P.3d 126 (2012). Because the deputy prosecutor's comments were a proper "analogy" used "to describe the relationship between circumstantial evidence, direct evidence, and the beyond-a-reasonable-doubt burden of proof," ***Curtiss***, 161 Wn. App. at 699, and because, even if they were construed as improper, they were not prejudicial, the defendant has failed to meet his burden of showing prosecutorial error. Therefore, the defendant's conviction should be affirmed.

d. The State did not commit prosecutorial error by making any disparaging comments about defense counsel, but was merely responding to defense counsel's closing. (not objected to by defendant Davis)

In this case, the State did not engage in making disparaging comments about either defendant's defense attorney. The State's comment was that everyone is entitled to vigorous representation and that such representation should not be considered to have merit. RP 1878. In other words, the defense theories should be rejected. Pointing out that the defense theory is without merit, i.e not supported by the evidence or common sense, is appropriate for a rebuttal argument. A prosecutor may properly "argue the facts in evidence, draw reasonable inferences from the evidence and express those inferences to the jury." ***State v. Stenson***, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). The defendants rely on ***State v. Lindsay***, 180 Wn.2d 423, 326 P.3d 125 (2014). Opening Brief of Davis, page 40. In ***Lindsay***, however, the statements made regarding defense counsel were, "[S]he doesn't care if the objection is sustained or not," "We're going to have like a sixth grader [argument]," and "[W]e're into silly." *Id.* at 432. The court held that such statements, on their own, did not require reversal. *Id.* Another statement in ***Lindsay***, however, did directly impugn defense counsel when the prosecutor stated in closing "This is a crock. What you've been pitched for the last four hours is a crock." *Id.*

In this case, however, the prosecutor's statement asking the jury not to confuse vigorous advocacy with merit, does not rise to any of the comments in ***Lindsay***. The comment was not self-centered or rude, and did not imply deception or dishonesty. Rather, it referenced what is at the heart of any trial—a material dispute of legal theories as applied to disputed facts. Because the prosecutor's comments did not impugn either defense attorney, their claim fails.

8. NEITHER DEFENDANT IS ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE. *(raised by both defendants)*

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." ***Rose v. Clark***, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." ***Neder v. United States***, 527 U.S. 1, 18, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). A defendant is entitled to a fair trial but not a perfect one, for "there are no perfect trials." ***Brown v. United States***, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973).

Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. ***Rose***, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also* ***State v. Kitchen***, 110 Wn.2d 403, 409, 756 P.2d 105 (1988), *abrogated in part on other grounds by* ***In re Personal Restraint of Stockwell***, 179 Wn.2d 588, 316 P.3d 1007 (2014) ("The harmless error rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.").

The doctrine of cumulative error, however, recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. ***In re Personal Restraint of Lord***, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); ***State v. Coe***, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also* ***State v. Johnson***, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) ("although none of the errors discussed above alone mandate reversal...."). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court's weighing those errors. ***State v. Russell***, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). There are two dichotomies of harmless errors that are relevant to the cumulative

error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. *See Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *See Id.* Second, there are errors that are harmless because of the strength of the untainted evidence, and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See,* e.g., ***Johnson***, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal, because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See*, e.g., ***State v. Stevens***, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) ("Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.").

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. *Compare* ***State v. Whalon***, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (holding that three errors amounted to cumulative error and required reversal), with ***State v. Wall***, 52 Wn. App. 665, 679, 763 P.2d 462, *review denied*, 112 Wn.2d 1008 (1988) (holding that three errors did not amount to cumulative error), and ***State v. Kinard***, 21 Wn. App. 587, 592 93, 585 P.2d 836, *review denied*, 92 Wn.2d 1002 (1979) (holding that three errors did not amount to

cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see*, e.g., ***State v. Badda***, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts as to cumulative error), or because the errors centered around a key issue, *see*, e.g., ***State v. Coe***, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility, combined with two errors relating to credibility of State witnesses, amounted to cumulative error because credibility was central to the State's and defendant's case); ***State v. Alexander***, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated, some so many times that a curative instruction lost all effect, *see,* e.g., ***State v. Torres***, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just

any error will not amount to cumulative error—the errors must be prejudicial errors. *See* ***Stevens***, 58 Wn. App. at 498.

In the instant case, for the reasons set forth above, neither defendant has failed to establish that any prejudicial error occurred at his trial, much less that there was an accumulation of it. Neither defendant is not entitled to relief under the cumulative error doctrine.

9. THE LAW DOES NOT REQUIRE DEFENDANT'S PREVIOUS STRIKE OFFENSES BE PROVED TO A JURY BEYOND A REASONABLE DOUBT. *(raised by Reed only)*

The Persistent Offender Accountability Act (POAA) is part of the Sentencing Reform Act of 1981 (SRA), chapter 9.94A. RCW which provides that the court, rather than the jury, determines the defendant's sentence. *See* RCW 9.94A.500(1). The POAA mandates that courts sentence "persistent offenders" to life imprisonment without the possibility of parole. RCW 9.94A.570. A criminal defendant is a "persistent offender" when he is an "offender" who: 1) has been convicted in this state of any felony considered a most serious offense; and 2) has, before the commission of the current offense, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.525—

provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted. RCW 9.94A.030(37).

The Washington Supreme Court has identified two questions of fact relevant to persistent offender sentencing: (1) whether certain kinds of prior convictions exist and (2) whether the defendant was the subject of those convictions. In determining those prior convictions, like ordinary sentencing determinations under the SRA, the trial judge conducts a sentencing hearing and decides those questions by a preponderance of the evidence. There is no right to a jury trial at sentencing under the persistent offenders statutes, and the State is not obliged to prove the constitutional validity of prior convictions. ***State v. Thorne***, 129 Wn.2d 736, 781-784, 921 P.2d 514 (1996); ***State v. Langstead***, 155 Wn. App. 448, 228 P.3d 799 (2010); ***State v. Manussier***, 129 Wn.2d 652, 682, 921 P.2d 473 (1996), *cert. denied*, 520 U.S. 1201, 117 S. Ct. 1563, 137 L. Ed. 2d 709 (1997).

Defendant initially argues that due process requires that any fact that increases defendant's sentence must be found by a jury beyond a reasonable doubt. Opening Brief of Reed, page 33. However, this is directly in contrast to the line of case law that is well settled on this issue. In ***Almendarez-Torres v. United States***, 523 U.S. 224, 247, 118 S. Ct.

1219, 140 L. Ed. 2d 350 (1998), the United States Supreme Court held that prior convictions are sentence enhancements rather than elements of a crime, and therefore need not be proved beyond a reasonable doubt to a jury. In ***Apprendi v. New Jersey***, the Court stated that "[*O*]*ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (emphasis added).

The Washington Supreme Court recognizes the ***Apprendi*** exception and has confirmed that prior felony convictions used to support a persistent offender sentence do not need to be proved to a jury beyond a reasonable doubt. ***State v. Wheeler***, 145 Wn.2d 116, 121, 34 P.3d 799 (2001). After the United States Supreme Court's decision in ***Ring v. Arizona***, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), the issue of whether proof of prior convictions had to be submitted to the jury was again brought before the Washington Supreme Court and again, it held that prior convictions need not be proved to a jury. ***State v. Smith***, 150 Wn.2d 135, 143, 75 P.3d 934 (2003). Then, in ***Blakely v. Washington***, the Court again enunciated the rule it expressed in ***Apprendi*** regarding the exception for prior convictions. 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

The Washington Supreme Court affirmed Division II's holding in ***State v. Witherspoon***, 180 Wn.2d 875, 329 P.3d 888 (2014), addressed this issue. In doing so, the court stated that Washington courts have long held that for the purposes of the POAA, a judge may find the fact of a prior conviction by the preponderance of the evidence. *Id.* at 893. Specifically, they stated "[W]e have repeatedly held that the right to jury determinations does not extend to the facts of prior convictions for sentencing purposes." *Id.* (*See* ***State v. McKague***, 172 Wn.2d 802, 803 N. 1, 262 P.3d 1225 (2011) (collecting cases); *see also* ***In re Personal Restraint of Lavery***, 154 Wn.2d 249, 256, 111 P.3d 837 (2005) ("In applying ***Apprendi***, we have held that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt."); ***State v. Smith***, 150 Wn.2d 135, 139, 75 P.3d 934 (2003) (prior convictions do not need to be proved to a jury beyond a reasonable doubt for the purposes of sentencing under the POAA)).

Despite challenges in both the United States Supreme Court and the Washington Supreme Court discussing the analysis in ***Almendarez-Torres v. United States***, neither court has departed from the principle in ***Apprendi*** that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt. Specifically, the Supreme

Court has cautioned against arguments such as defendant's which attempt to manipulate the holding in ***Apprendi*** by saying:

> We [the United States Supreme Court] do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reason rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

State v. McKague, 159 Wn. App. 489, 515, 246 P.3d 558 (2011) (emphasis in original) (*citing* ***Agostini v. Felton,*** 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997)); *see also* ***State v. Witherspoon***, 171 Wn. App. 271, 318, 286 P.3d 996 (2012), *affirmed*, 180 Wn.2d 875, 329 P.3d 888 (2014). Defendant's argument is without merit and attempts to re-litigate issues that have long since been decided. The courts have made clear that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt.

10. DISTINGUISHING BETWEEN A PRIOR CONVICTION AS A SENTENCING FACTOR AND AN ELEMENT DOES NOT VIOLATE EQUAL PROTECTION WHEN A RATIONAL BASIS EXISTS IN THE PURPOSE FOR DOING SO. (raised by Reed only)

Under both the state and federal constitutions, persons similarly situated with respect to the legitimate purpose of the law must receive like

treatment. ***State v. Manussier***, 129 Wn.2d 652, 672, 921 P.2d 473 (1996), *cert. denied*, 520 U.S. 1201, 117 S. Ct. 1563, 137 L. Ed. 2d 709 (1997). A statutory classification that implicates physical liberty is subject to rational basis scrutiny unless that classification also affects a semisuspect class. ***State v. Thorne***, 129 Wn.2d 736, 771, 921 P.2d 514 (1996). Recidivist criminals are not a suspect class and thus, defendant's challenge is subject to rational basis review. ***Mannussier***, 129 Wn.2d at 673.

A statute survives rational basis review if the statute is rationally related to achieve a legitimate state interest and the classification does not rest on grounds that are wholly irrelevant to achieving the state interest. ***State v. McKague***, 159 Wn. App. 489, 518, 246 P.3d 558 (2011) (*citing* ***Schoonover v. State***, 116 Wn. App. 171, 182, 64 P.3d 677 (2003)). The burden is on the party challenging the classification to show that it is purely arbitrary. ***Thorne***, 129 Wn.2d at 771.

In the present case, defendant argues that distinguishing between a prior conviction as a sentencing aggravator and a prior conviction as an element is arbitrary and lacks a rational basis because the government interest in either case is to punish repeat offenders more severely. Opening Brief of Reed, page 39. This argument is similar to the argument advanced in the affirmed case of ***State v. Witherspoon***, 171 Wn. App. 271, 304, 286 P.3d 996 (2012), *affirmed*, 180 Wn.2d 875, 329 P.3d 888 (2014),

in which the rational basis by the legislature for such a distinction is explored and explained. In that case, the court held that "there is a rational basis for distinguishing between 'persistent offenders' and 'nonpersistent offenders' under the POAA." *Id.* At 305. The court described:

> [t]he legislature did not include all recidivists under the POAA, but specifically targeted the most serious, dangerous offenders. ***Thorne***, 129 Wn.2d at 764, 921 P.2d 514. Notably, the purpose of the POAA is to improve public safety by placing the most dangerous criminals in prison and reduce the number of serious, repeat offenders by tougher sentencing. RCW 9.94A.555. And it is within the legislature's discretion to define what facts constitute elements of the crime and the penalty for that crime, even where prior convictions as an element of the crime have the singular effect of increasing punishment for recidivists. ***Thorne***, 129 Wn.2d at 767, 921 P.2d 514.

Id.

Specifically, the court cited two cases directly on point with defendant's argument in the present case. In ***State v. Langstead***, 155 Wn. App. 448, 454-457, 228 P.3d 799, *review denied*, 170 Wn.2d 1009, 249 P.3d 624 (2010), and ***State v. Williams***, 156 Wn. App. 482, 496-499, 234 P.3d 1174, *review denied*, 170 Wn.2d 1011, 245 P.3d 773 (2010), Divisions One and Three of this court held that under the POAA there is a rational basis to distinguish between a recidivist charged with a serious felony and a person whose conduct is felonious only because of a prior conviction for a similar offense. As stated in ***Langstead***, "[a] prior

conviction when used as an aggravator merely 'elevates the maximum punishment' for a crime, while a prior conviction used as an element actually alters the crime that may be charged." ***Langstead***, 155 Wn. App. At 455. As such, this court should find defendant's right to equal protection was not violated as the courts have already considered defendant's argument that there is no difference in the purpose behind using a prior conviction as a sentencing aggravator and a prior conviction as an element and found such an argument to be without merit.

11. APPELLATE COSTS ARE APPROPRIATE IF THIS COURT AFFRIMS DEFENDANT REED'S JUDGMENT. (raised by Reed only)

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant. ***State v. Blank***, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997). As the Court pointed out in ***State v. Sinclair***, 192 Wn. App. 380, 612-613, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016), the award of appellate costs to a prevailing party is within the discretion of the appellate court. *See also* RAP 14.2; ***State v. Nolan***, 141 Wn.2d 620, 8 P.3d 300 (2000). So, the question is not: can the Court decide whether to order appellate costs; but when, and how?

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In

1976[12], the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. *Id.* In ***State v. Barklind***, 87 Wn.2d 814, 557 P.2d 314 (1977), the Supreme Court held that requiring a defendant to contribute toward paying for appointed counsel under this statute did not violate, or even "chill" the right to counsel. *Id.*, at 818.

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In ***Blank***, *supra*, at 239, the Supreme Court held this statute constitutional, affirming this Court's holding in ***State v. Blank***, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996).

Nolan, 141 Wn.2d 620, noted that in ***State v. Keeney***, 112 Wn.2d 140, 769 P.2d 295 (1989), the Supreme Court found the imposition of statutory costs on appeal in favor of the State against a criminal defendant to be mandatory under RAP 14.2 and constitutional, but that "costs" did not include statutory attorney fees. ***Keeney***, at 142.

Nolan examined RCW 10.73.160 in detail. The Court pointed out that, under the language of the statute, the appellate court had discretion to award costs. 141 Wn.2d at 626, 628. The Court also rejected the concept or belief, espoused in ***State v. Edgley***, 92 Wn. App. 478, 966 P.2d 381

[12] Actually introduced in Laws of 1975, 2d Ex. Sess. Ch. 96.

(1998), that the statute was enacted with the intent to discourage frivolous appeals. ***Nolan***, at 624-625, 628.

In ***Nolan***, as in most of other cases discussing the award of appellate costs, the defendant began review of the issue by filing an objection to the State's cost bill. *Id.*, at 622. As suggested by the Supreme Court in ***Blank***, 131 Wn.2d at 244, this is an appropriate manner in which to raise the issue. The procedure invented by Division I in ***Sinclair***, prematurely raises an issue that is not before the Court. The defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill, if he does not prevail, and if the State files a cost bill.

Here, the defendant appeared to be able-bodied and capable of working. The State has yet to "substantially prevail." It has not submitted a cost bill. Any assertion that the defendant cannot and will never be able to pay appellate costs is belied by the record. This Court should wait until the cost issue is ripe before exploring it legally and substantively.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests that each defendant's convictions be affirmed.

DATED: November 15, 2016

MARK LINDQUIST
Pierce County
Prosecuting Attorney

Thomas C. Roberts (17442 BOR)

MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/15/16 [signature]
Date Signature

PIERCE COUNTY PROSECUTOR

November 15, 2016 - 3:00 PM

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Sender Name: Heather M Johnson - Email: hjohns2@co.pierce.wa.us

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DDVBURNS@AOL.COM
glinskilaw@wavecable.com